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No. 82-495

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CROWN ZELLERBACH CORPORATION,
Petitioner,

vs.

ARTHUR N. ARONSEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is a court of appeals permitted under *Delaware State College v. Ricks* and *Chardon v. Fernandez* to reverse a grant of summary judgment in favor of an employer under the Age Discrimination in Employment Act on an issue of when a limitations period begins to run, where there is a factual dispute in the record as to when unequivocal notice to terminate on a specific date was given?

2. Should this Court decline to review a court of appeals' reversal of summary judgment and its remand to the district court to develop a more complete factual record on whether a limitations period has been equitably tolled by employer conduct, in light of this Court's recent holding in *Zipes v. Trans World Airlines, Inc.* that civil rights limitations statutes are subject to equitable modification?

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BRIEF IN OPPOSITION

INTRODUCTION

At issue in this Petition for Writ of Certiorari is whether every advance indication by an employer of a future intent to terminate an employee, no matter how ambiguously phrased, shall be governed by the rule of *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *Chardon v. Fernandez,* 454 U.S. 6 (1981) which cases mandate the commencement of the running of limitations periods at the time of giving of such notice of termination or whether, on the other hand, courts of appeal may require, before *Ricks* and *Chardon* may be applied on summary judgment, a minimal factual record of both an unequivocal intent to terminate and the inapplicability of the doctrine of equitable tolling of the limitations period.

STATEMENT OF THE CASE

Petitioner, Crown Zellerbach, contends for a date for the commencement of the running of the limitations period in March of 1975. The factual record of what happened on that unspecified date is not entirely clear since the district court dismissed the action on a motion for summary judgment. According to Crown, on a date "in the spring of 1975, sometime on or before March 31," which date could not be pinpointed, Aronsen, who had at that time worked for the company for 27 years and was a middle level executive, was told by an executive Vice President that:

> "his employment at Crown was terminated and that, effectively (sic) immediately, any job duties or responsibilities which he formerly had to Crown were ended" C.R. 63.[1]

No writing memorializing this conversation was a part of the record below, and apparently none was ever made.

Aronsen recalled the Mitchell conversation quite differently. Aronsen testified on deposition that Mitchell said "I was being terminated, or words to that effect, and my reaction was that I didn't believe it." C.R. 105. By affidavit in opposition to the motion to dismiss, Aronsen explained that "Mitchell never used the word 'termination', but I interpreted the conversation as giving me notice that Crown was getting ready to terminate me." C.R. 148.

In the same conversation, Mitchell gave Aronsen the option of taking a lesser position in Los Angeles at a 20 per cent cut in pay or remaining at full salary, while being relieved of all responsibility to perform work for Crown,

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[1]Citations are to the record before the court of appeals.

and utilizing the services of an executive employment service. C.R. 63, 106, 149.

After a week of reflection, Aronsen told Mitchell that he had elected the second alternative. Mitchell then offered to continue Aronsen's employment for six months while he used the services of the employment agency. This period was extended another six months, through March 31, 1976. Aronsen continued "on the payroll" during this period C.R. 106.

Not until Crown made its motion to dismiss did Mitchell characterize Aronsen's salary after the conversation as "severance benefits." Regardless of the label Crown concedes that Aronsen continued to be paid "at his then current salary rate" until March 31, 1976. C.R. 63. The district court seized upon Crown's characterization of Aronsen salary as "severance benefits," in ruling on Crown's motion to dismiss, even though Crown introduced none of the personnel records in its possession which would have settled this question of fact.

During that year, Aronsen did very little work for Crown while he undertook a wide-ranging, unsuccessful search for a new job. C.R. 149. In the summer of 1975, he was called in to advise respecting a problem at one of Crown's plants, which occupied a few days. C.R. 104, 190; R.T. 12/16/77, p. 7.

During the year following the Mitchell conversation, Aronsen also took on a few outside consulting jobs for which he was compensated directly. However, this was only after Aronsen had expressly sought and received Mitchell's permission, conduct wholly inconsistent with prior termina-

tion of the employer-employee relationship. C.R. 105, 197, 114, 116.

During the year following the Mitchell conversation, Aronsen continued every incident of his employment. He retained his office and secretary in Crown's corporate headquarters in San Francisco; he reported through the same chain of command in the same research division where he had been assigned for several years and he continued to submit expense account forms in the same manner as before the Mitchell conversation. There was no change in his status on the personnel records of Crown. C.R. 150.

Finally, on March 18, 1976, Aronsen received his first written notice of termination, by letter from Senior Vice-President M.M. Jamieson. C.R. 161. This letter confirmed a March 2, 1976 conversation with Aronsen "regarding your termination of employment with Crown Zellerbach on March 31, 1976." The letter introduced an apparent ambiguity, however, respecting Aronsen's status during the year after the Mitchell conversation, by referring to that period as a "terminal leave of absence with pay which began April 1, 1975." C.R. 161.

The district court interpreted this reference to "terminal leave of absence" as signalling that "termination" occurred on March 31, 1975, rather than the "termination" on March 31, 1976 actually identified in Jamieson's letter. Crown submitted no personnel records that would have settled this question of fact.

The district court held that the unlawful employment practice occurred at the March, 1975 meeting, at which time Aronsen was either told that he "was terminated", or was told that his employer "was getting ready to terminate me".

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS' CONCLUSION THAT IT DID NOT HAVE BEFORE IT AN ADEQUATE RECORD ON WHICH TO DETERMINE THAT THE RICKS-CHARDON RULE APPLIED DOES NOT MERIT REVIEW BY THIS COURT

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980) this Court held that a communicated decision to deny tenure to a college teacher begins the running of applicable limitations periods in claims under Title VII and 42 USC § 1981 and that the granting of a one year terminal teaching contract thereafter did not, when the only discriminatory act pleaded was the denial of tenure, extend the time within which to file. In *Chardon v. Fernandez*, 454 U.S. 6 (1981) it was held that an unequivocal notice of termination which is by its terms to be effective on a specific future date commences the running of the period of limitations. *Ricks* was decided by this Court after briefing was completed below in the Ninth Circuit and at the court's request supplemental briefing on the applicability of *Ricks* was provided. In its opinion, the Ninth Circuit applied the *Ricks* standard and determined that summary judgment was an inappropriate procedure to resolve factual issues concerning when termination took place and whether equitable tolling of the limitations period took place. The Ninth Circuit emphasized the essentially factual nature of the determinations to be made under *Ricks* and the inappropriateness of making these determinations on summary judgment.

In *Ricks*, this Court stated:

> "Complaints that employment termination resulted from discrimination can present widely varying cir-

cumstances. In this case the only alleged discriminatory act is the denial of tenure sought by a college professor, with the termination of employment not occurring until a later date. The application of the general principles discussed herein necessarily must be made on a case-by-case basis." 449 U.S. at 258, n. 9.

Now that this Court has resolved the prior uncertainty as to whether continued employment following notice of intention to terminate tolls the running of the limitations period, the "case-by-case" adjudications of the factual bases for the application of the rule should be left to trial courts and to the various courts of appeal. When a circuit concludes that an inadequate factual record presented by summary judgment disposition mandates remand, the normal considerations governing this Court's exercise of its *certiorari* jurisdiction require a decision to decline the petition.

II

THE NINTH CIRCUIT'S RULING ON THE ISSUE OF EQUITABLE TOLLING SHOULD NOT BE REVIEWED BY THIS COURT UNLESS THIS COURT INTENDS TO ANNOUNCE A NEW RULE COMPLETELY PROHIBITING THE EQUITABLE TOLLING OF PERIODS OF LIMITATION UNDER ADEA

The Ninth Circuit properly considered and ruled on the issue of equitable tolling of the limitations period. Although the parties did not plead the issue in the district court nor argue or brief the issue to the Ninth Circuit, the district court did in fact rule on the issue in its grant of summary judgment by holding that Crown's acts after announcing its intent to discharge Aronsen did not "toll the operation of Section 626(d)." See Petition for Writ of Certiorari, Appendix C at 3c.

Even if the district court had not considered the tolling issue, the Ninth Circuit could properly have raised it. Although an appellate court does not generally consider issues unless raised below, this rule of practice is not inflexible. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below." Id. at 557.

Among those "exceptional cases" referred to in *Hormel* are "those in which there have been judicial interpretations of existing law after decision below and pending appeal-interpretations which if applied might have materially altered the result." Id. at 558-59 (footnote omitted). *Hormel* itself was such a case, as is the case at bar. As noted by the Ninth Circuit, that court's holding, in *Naton v. Bank of California*, 649 F.2d 691, 695-96 (9th Cir. 1981), that the Age Discrimination in Employment Act's limitations periods were subject to equitable modification, was subsequent to the district court's 1978 decision in the case at bar. *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 595 (9th Cir. 1981); Petition, Appendix C. Given the newly developed, carefully explained standards of *Naton*, the Ninth Circuit obviously believed the district court's cursory treatment of the equitable tolling issue was inadequate. Id at 595. The Ninth Circuit's judgment was squarely within the *Hormel* rule and consistent with the policy behind that rule.

The policy behind the general practice of not considering issues unless raised below—that litigants not be suprised on appeal by final decision there on issues upon which they have had no opportunity to introduce evidence, was also

consistent with the Ninth Circuit's decision because the court did not reach the merits of the equitable tolling issue, but merely remanded the issue to the district court for a fuller consideration of the facts, in light of more recent legal developments. *See Aronsen*, 662 F.2d at 595-96. Crown will have ample opportunity on remand to brief, argue and present evidence on the equitable tolling issue and thus is not prejudiced by the Ninth Circuit's handling of this issue.

The Ninth Circuit's holding that the facts of this case may support an equitable tolling argument is entirely consistent with this Court's handling of equitable tolling of civil rights limitations statutes. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) this Court for the first time expressly held that a time limit for filing an employment discrimination charge was "not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393 (footnote omitted). Although *Zipes* was a Title VII case, there is no doubt that the Court intended the above holding to apply to ADEA cases as well since the Court relied in part on the legislative history of the ADEA in formulating the *Zipes* rule. *Id.* at 395, n. 11.

That the *Zipes* holding in no way conflicts with *Ricks* is demonstrated by the Court's citation to *Ricks* as one of the earlier Supreme Court cases which implied what *Zipes* held expressly—that civil rights limitations statutes are subject to equitable modification. *See Zipes* 455 U.S. at 395-96, n. 12.

Petitioner appears to be seeking review of the factual basis for the Ninth Circuit's ruling on the equitable tolling

issue. The Ninth Circuit's precise holding on this issue was: "Because the facts in this case do not foreclose application of equitable tolling, the district court's grant of summary judgment to (petitioner) on this basis must . . . be reversed." *Aronsen*, 662 F.2d at 595. Recognizing the factual nature of equitable tolling and that the issue almost always involves the credibility of witnesses, the court merely held that the issue should not have been decided on summary judgment. *Ibid.*

The Ninth Circuit's holding is entirely consistent with the Fourth Circuit's decision in *Lawson v. Burlington Industries, Inc.*, 683 F.2d 862 (4th Cir. 1982)[2]. The *Lawson* court upheld a grant of summary judgment for the defendant on the equitable tolling issue, based on the particular facts of that case, which plaintiff had an opportunity to present and argue prior to the district court's granting of the judgment. *See Lawson*, 683 F.2d at 864. The controlling distinction between *Lawson* and the case at bar is that here the equitable tolling issue was not fully briefed or presented prior to the district court's grant of summary judgment. *See Aronsen*, 662 F.2d at 595, n. 20. The district court decided the issue in passing and, in the Ninth Circuit's view, on a clearly inadequate factual record. *Id.* at 595.

This court should decline to review the factual aspect of the equitable tolling issue in this case. The Supreme Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). That this well established rule applies to

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[2]This case appears to be the sole basis for petitioner's filing of its Supplemental Brief in Support of Petition for Writ of Certiorari.

the instant case is borne out by this Court's disposition of *Zipes*, where after holding that the limitations period was subject to waiver and equitable modification, the Court declined to consider the factual merits of the case, properly leaving that function to the lower courts. Another reason for following the *Johnston* rule is that the inadequacy of the factual record in this case would preclude any meaningful examination of the factual aspect of the equitable tolling issue.

Since the equitable tolling issue was properly before the Ninth Circuit, and that court's ruling merely required a fuller examination of the factual aspect of this issue, this Court should decline to review the equitable tolling issue since the ruling below is completely consonant with the holding of *Zipes* and, because it is merely a remand to develop a more complete factual record, not inconsistent with *Ricks* or *Chardon*.

CONCLUSION

The decision of the court of appeals is fully consistent with the decisions of this Court in *Ricks* and *Chardon* and in view of the inadequate factual record below was mandated by this Court's decision in *Zipes*. The petition for writ of certiorari should be denied.

January 14, 1983

Respectfully submitted,

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